ABOUT THE WEEKLY SUMMARY

The Weekly Summary of NLRB cases, as the name implies, is a publication that summarizes each week all published NLRB decisions in unfair labor practice and representation election cases, except for summary judgment cases. It also lists all decisions of NLRB administrative law judges and direction of elections by NLRB regional directors. Links are established from the weekly summary index to the summaries and from the summaries to the full text of the decisions.

Weekly Summary of NLRB Cases

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December 14, 2001 W-2821

CASES SUMMARIZED

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Correction: In the last issue (W-2820), an administrative law judge's decision listed on pg. 6, *Corporate Interiors, Inc.*, should read JD(ATL)-71-01.

Carrier Corporation (28-CA-16727; 336 NLRB No. 120) Las Vegas, NV Dec. 6, 2001. The Board adopted the administrative law judge's findings, in the absence of exceptions, that the Respondent violated Section 8(a)(1) of the Act by equating protected activity with disloyalty, making implied threats of reprisals, and prohibiting employees from talking with others about protected activities, including Board proceeding; and his dismissal of the allegation that Supervisor Anthony Derfoldi threatened Kenneth W. Crosby in violation of Section 8(a)(1). [HTML] [PDF]

In adopting the judge's finding that the Respondent did not violate the Act when it laid off Crosby, Members Liebman and Walsh found it unnecessary to pass on the judge's finding that the General Counsel failed to satisfy his initial burden under *Wright Line,* 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), to establish that Crosby protected concerted activities were a motivating factor in the Respondent's decision to lay him off. Even assuming arguendo that the General Counsel met his burden under Wright Line, they concluded the Respondent has demonstrated that it would have laid off Crosby even in the absence of such activities, relying on the judge's finding that credited testimony establishes a "concrete and lawful reason for selecting Crosby for layoff," namely his insubordinate refusal at the July 5, 2000 meeting to acknowledge the Respondent's authority to assign work to employees.

Chairman Hurtgen would adopt the judge's decision in its entirety, including her finding that the General Counsel failed to establish that Crosby's protected concerted activities were a motivating factor in the Respondent's decision to lay him off.

(Chairman Hurtgen and Members Liebman and Walsh participated.)

Charge filed by Kenneth W. Crosby, an individual; complaint alleged violation of Section 8(a)(1). Hearing in Las Vegas on June 1 and 13, 2001. Adm. Law Judge Lana H. Parke issued her decision Aug. 10, 2001.

* * *

The Earthgrains Company (11-CA-18295, 18339, 11-RC-6327; 336 NLRB No. 117) Orangeburg, SC Dec. 3, 2001. The Board affirmed the administrative law judge's findings that the Respondent violated Section 8(a)(3) and (1) of the Act by withholding a previously scheduled wage increase from maintenance employees because of their union activities; and Section 8(a)(1) by various acts, including when Respondent's senior vice president, Talmadge Miles, threatened maintenance employees with denial of a planned increase if Electrical Workers IBEW Local 776 won the representation election. It set aside the election held in Case 11-RC-6327 on April 21, 1999 based on those violations found that occurred during the critical preelection period and that correspond to the Union's objections, and remanded the case to the Regional Director to conduct a new election. Chairman Hurtgen dissented in part. [HTML] [PDF]

Members Liebman and Walsh agreed with the judge that Senior Vice President Miles' statement that "there were no promises period," and that if the Union were voted in, "everything is negotiable from that point," threatened the loss of benefits as it confirmed Plant Manager David Maxwell's earlier unlawful statements that, if the employees selected the Union as their collective-bargaining representative, they would not receive the previously scheduled wage increase and the wage increase would have to be negotiated.

Contrary to his colleagues, Chairman Hurtgen would find that Miles' statement to the maintenance employees did not violate Section 8(a)(1). He does not agree with the judge that the statement was a confirmation of the one made by Plant Manager Maxwell, concluding: "Unlike Maxwell, Miles expressly disavowed a promise and made no threat."

The Board adopted, in the absence of exceptions, the judge's recommended dismissal of the 8(a)(1) allegations that Supervisor Eric Antley threatened an employee with job loss and solicited grievances and promised to remedy them; that Miles threatened employees with loss of benefits and promised that things would get better if the employees did not select the Union; that Supervisor Gene Rodoski threatened employees with loss of benefits and working conditions; and that the Respondent announced a new pension plan and 401(k) plan to discourage support for the Union. There being no exceptions to the judge's recommendation not to grant a bargaining order remedy under the circumstances of this case, the Board found it unnecessary to pass on the judge's discussion of whether and when the Union achieved a card majority.

(Chairman Hurtgen and Members Liebman and Walsh participated.)

Charges filed by Electrical Workers IBEW Local 776; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at Orangeburg on Sept. 13-14 and 20-22, 1999. Adm. Law Judge George Carson II issued his decision Dec. 1, 1999.

* * *

United Parcel Service (32-CA-17468; 336 NLRB No. 119) Oakland, CA Dec. 5, 2001. Reversing the administrative law judge, the Board found that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to bargain with the Union over the effects of the relocation of the employee parking lot. [HTML] [PDF]

The Respondent leases its facility from the Port of Oakland (the Port) and its employees parked in a lot that was owned and operated by the Port for use by its tenants. The parking lot was no more than a 5-minute walk from the Respondent's facility. In March 1999 the Port notified its tenants that it was closing the parking lot on April 1 and was opening another lot located about 1-1/2 miles from the Respondent's facility. It is undisputed that it takes the employees an additional 20 minutes to reach their jobsites from the new parking lot, increasing their commuting time by at least 40 minutes per day.

The Board noted that the judge correctly held that employee parking is a mandatory subject of bargaining. It said the judge erred by concluding that the Respondent was relieved from bargaining over the effects of the relocation of the employee parking lot because the Respondent had no role in that decision.

(Chairman Hurtgen and Members Liebman and Walsh participated.)

Charge filed by Teamsters Local 70; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Oakland on Aug. 14, 2000. Adm. Law Judge Frederick C. Herzog issued his decision April 25, 2001.

* * *

McFarling Foods, Inc. (25-RC-10035; 336 NLRB No. 122) Indianapolis, IN Dec. 5, 2001. The Board reversed the hearing officer's recommendation that the challenges to the ballots of Calvin "Jack" Finney and Charles Stokes be sustained based on his findings that neither employee shared a community of interest with bargaining unit employees, explaining: "A determination of voter eligibility based on community-of-interest principles is appropriate only if the parties' intent is unclear and the stipulated unit is ambiguous. . . . Here, however, we have no difficulty in determining the parties' intent." [HTML] [PDF]

The tally of ballots for the election held on June 20, 2001 showed 29 for and 28 against the Petitioner (Teamsters Local 135), with 7 determinative challenged ballots. In the absence of exceptions, the Board adopted, pro forma, the hearing officer's recommendations to sustain the challenge to one ballot and to overrule the challenges to three others.

The Petitioner challenged the ballots cast by Finney and Stokes, who work as regular part-time employees in the Employer's warehouse. The Employer contended in exceptions that the hearing officer erred by using a community-of-interest analysis rather than giving effect to the clear intent of the parties' unit stipulation. The Board agreed and held that the stipulated unit included all regular part-time warehouse employees, with the exception only of individuals in specifically excluded job classifications (drivers, office clericals, professionals, guards, and supervisors), and makes no further distinction based on the kind of work performed by an employee in the warehouse. It found that the parties intended to include Finney and Stokes in the stipulated unit. Contrary to the hearing officer, the Board included their ballots among those remanded to the Regional Director with direction to open and count them and to issue a revised tally of ballots, with the appropriate certification.

(Chairman Hurtgen and Members Liebman and Walsh participated.)

* * *

Advanced Stretchforming International (21-CA-29104; 336 NLRB No. 124) Gardena, CA Dec. 7, 2001. The Board remanded the proceeding to the administrative law judge to reopen the record for the limited purpose of taking evidence on the extent of the Respondent's backpay liability. In 1997, the Board found that the Respondent, as successor employer, violated Section 8(a)

(5) and (1) of the Act by unilaterally changing terms and conditions of employment set forth in the collective-bargaining agreement between Auto Workers Local 509 and a predecessor employer. It ordered the Respondent to restore the status quo by rescinding any unilateral changes and to make the unit employees whole by remitting all wages and benefits that would have been paid absent its unlawful conduct, until it negotiated in good faith with the Union to agreement or to impasse. 323 NLRB 529. [HTML] [PDF]

Thereafter, the Board petitioned for enforcement of its Order with the U.S. Court of Appeals for the Ninth Circuit and, on November 22, 2000, the court issued its decision enforcing the Board's Order, except for the backpay award. *NLRB v. Advanced Stretchforming International, Inc.,* 233 F.3d 1176, cert denied __S. Ct __ (October 9, 2001). The court held the "Board applied the presumption that an award of backpay and benefits under the repudiated bargaining agreement restores the status quo ante, but did not consider whether [the Respondent] had rebutted that presumption with evidence that it would have bargained to an impasse and imposed less favorable terms." 233 F.3d at 1182. Because the record was not fully developed under this "correct legal standard," the court remanded the case to permit the Respondent and the Union to "present evidence on whether [the Respondent] and the Union would have bargained to impasse and imposed terms, even had the [Respondent] honored its obligation to bargain with the Union." Id. at 1183.

The Board accepted the court's decision as the law of the case and remanded to the judge for reopening of the record and further hearing limited to the extent of the Respondent's backpay liability. In a footnote, Chairman Hurtgen noted his views that a successor employer is ordinarily free to set its own terms and conditions of employment and that this Respondent's Section 8(a)(1) statement that there would be no union at its facility, did not forfeit that right. While he would not have required the Respondent to continue the predecessor's terms and conditions of employment, he acquiesced in the law of the case herein, and agreed with the Board's remand order.

(Chairman Hurtgen and Members Liebman and Walsh participated.)

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LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Hanson Aggregates Central, Inc. (Teamsters Local 988) Houston, TX November 30, 2001. 16-CA-20885, et al.; JD(ATL)-76-01, Judge George Carson II.

Sociedad Espanola de Auxilio Mutuo y Beneficencia de P.R. (Unidad Laboral de Enfermeras (os) y Empleados de la Salud) Hato Rey, PR November 30, 2001. 24-CA-7993, et al.; JD-136-01, Judge George Aleman.

Moeller Manufacturing Co. and Auto Workers Local 157 (an Individual) Detroit, MI December 6, 2001. 7-CA-43981, 7-CB-12826; JD(NY)-60-01, Judge Raymond P. Green.

Central Valley Meat Co. (Farm Workers) Hanford, CA October 16, 2001. 32-CA-17951, et al.; JD(SF)-82-01, Judge John J. McCarrick.

Tradesmen International (Electrical Workers Local 545) Overland Park, KS November 27, 2001. 17-CA-20952; JD(SF)-91-01, Judge Albert A. Metz.